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Zulina bt Mohd Omar v Public Bank Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(NCVC)(A)-159–01 OF 2016
LIM YEE LAN, ZALEHA YUSOF AND HARMINDAR SINGH JJCA
26 DECEMBER 2017

C

Land Law — Priorities — Charge — Doctrine of equity of redemption in English Law — Whether applicable in Malaysia — Whether applicable to statutory charge under National Land Code — Whether applicant had locus standi — Whether applicant had beneficial interest in property

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In consideration of a housing loan for the sum of RM240,000 and an overdraft facility in the sum of RM150,000 granted by the respondent, the appellant's husband ('Nazri') created two charges in favour of the respondent over a property which he owned. When Nazri was adjudged a bankrupt, the respondent obtained an order for sale of the property. The appellant applied to the High Court by way of an originating summons ('the first OS') in her capacity as Nazri's wife, seeking declarations and orders that: (a) she had a beneficial interest in the property; (b) the respondent be directed to issue to her a redemption statement in respect of all outstanding amounts under all loans/facilities granted by the respondent to her husband to enable her to redeem the property; and (c) the order for sale be stayed for three months pending the redemption exercise. The High Court granted order in terms of the first OS to the appellant ('the first order'). Pursuant to the first order, the respondent issued two notices in Nazri's name, namely a notice of consolidation of accounts ('notice of consolidation') and a notice under the heading 'redemption sum cum undertaking' ('redemption statement'). The notice of consolidation consolidated outstanding amounts under the accounts maintained by Nazri for the purpose of servicing the loan and overdraft facilities granted to him by the respondent. The appellant complained to the respondent that the redemption statement was incorrect or invalid. The respondent responded that the redemption statement was correctly issued under the terms of the first order. Dissatisfied with the response of the respondent, the appellant then filed a second originating summons, seeking orders/declarations that: (a) the respondent had no right to consolidate the CSC account with the housing loan and overdraft facility accounts and the notice of consolidation was a clog to the right of redemption granted to the appellant in the first order; (b) the redemption statement did not contain a correct or valid redemption sum in accordance with the terms of the first order; (c) the respondent to reissue a redemption statement that correctly reflects the outstanding amounts due under the housing loan and overdraft facility

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A accounts only; and (d) the order for sale be stayed pending the disposal of the action. The High Court judge (who had earlier granted the first order), dismissed the second OS with costs.

Held, dismissing the appeal and affirming the decision of the High Court:

B (1) The term 'equity of redemption' does not exist in this country and the persistence in its use is not a matter of law but of habit. Therefore, it was clear that the appellant, as Nazri's wife, had no locus standi, whether in law or equity, to apply for the various reliefs in the first OS and to speak of the appellant's 'equity of redemption' or the like of it in respect of the C property under the NLC was not only technically and legally incorrect, but a misnomer and nonsensical (see paras 24 & 26).

(2) Had Nazri himself as the borrower/chargor applied to the respondent to discharge the property as security under the two statutory charges, he D would have been bound by the clauses in the annexures to the two charges. There was therefore no reason why the appellant should have a better right than Nazri in a similar application; neither would the respondent have agreed to the terms in the first order had it been otherwise. The redemption statement was properly issued in accordance E with the terms of the first order and there was no error or mistake in the said redemption statement to warrant its setting side (see paras 35–36).

[Bahasa Malaysia summary

Sebagai balasan pinjaman perumahan bagi jumlah RM240,000 dan F kemudahan overdraf berjumlah RM150,000 yang diberi oleh responden, suami perayu ('Nazri') membuat dua pajakan berpihak pada responden terhadap satu hartanah yang dimilikinya. Apabila Nazri diisytiharkan bankrap, responden memperoleh satu perintah jualan hartanah tersebut. Perayu memohon di Mahkamah Tinggi, melalui satu saman pemula ('saman pemula G pertama') dalam kapasitinya sebagai isteri Nazri, memohon pengisytiharan dan perintah bahawa: (a) dia mempunyai kepentingan benefisial dalam hartanah; (b) responden diarahkan mengisukan pernyataan tebusan bagi kesemua jumlah tertunggak bawah semua pinjaman/kemudahan yang diberi oleh responden kepada suaminya untuk membolehkan dia menebus hartanah H tersebut; dan (c) perintah jualan digantung selama tiga bulan sementara menanti langkah tebusan. Mahkamah Tinggi membenarkan perintah seperti dikehendaki dalam SP pertama kepada perayu ('perintah pertama'). Bawah perintah pertama, responden mengisukan dua notis bawah nama Nazri, khususnya notis gabungan akaun ('notis gabungan') dan notis bertajuk I 'tebusan jumlah merangkap aku janji' ('pernyataan tebusan'). Notis tebusan menggabungkan jumlah-jumlah tertunggak bawah jumlah yang disenggara oleh Nazri bagi tujuan menyenggara pinjaman dan kemudahan overdraf yang tidak betul atau tidak sah. Responden membalas bahawa pernyataan tebusan tersebut diisukan dengan betul mengikut terma perintah pertama. Tidak

berpuas hati dengan respon responden, perayu memfailkan saman pemula kedua, memohon perintah/deklarasi bahawa: (a) responden tiada hak menggabung CSC akaun dengan akaun pinjaman perumahan dan kemudahan overdarf dan notis gabungan menyekat hak tebusan yang diberi kepada perayu dalam perintah pertama; (b) pernyataan tebusan tidak mengandungi jumlah tebusan yang betul atau sah, selaras dengan terma perintah pertama; (c) responden mengeluarkan semula pernyataan tebusan yang mencerminkan jumlah tertunggak bawah akaun pinjaman perumahan dan kemudahan overdraf sahaja dengan betul; dan (d) perintah jual digantung sementara pelupusan tindakan. Hakim Mahkamah Tinggi (yang terdahulu telah membenarkan perintah pertama), menolak SP kedua dengan kos.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Terma ekuiti tebusan tidak wujud di negara ini dan penggunaannya yang kerap bukanlah hal perkara undang-undang tetapi tabiat. Oleh itu, jelas bahawa perayu, sebagai isteri Nazri, tiada locus standi, sama ada bawah undang-undang atau ekuit, untuk memohon pelbagai relief dalam SP pertama dan menyatakan ekuiti tebusan perayu atau yang serupa dengannya tentang hartanah bawah KTN, bukan sahaja tidak betul bawah perundangan atau secara teknikal tetapi juga tidak sesuai dan mengarut (lihat perenggan 24 & 26).

(2) Jika Nazri sendiri sebagai peminjam/pemajak memohon kepada responden untuk melepaskan hartanah sebagai cagaran bawah dua pajakan statutori, dia akan terikat dengan klausa-klausa dalam lampuran dua pajakan tersebut. Oleh itu, tiada sebab kenapa perayu mempunyak hak yang lebih berbanding Nazri dalam permohonan yang serupa; responden tidak akan bersetuju dengan terma-terma dalam perintah pertama jika pun sebaliknya. Pernyataan tebusan diisukan dengan betul selaras dengan terma-terma perintah pertama dan tiada kesilapan atau kekhilafan dalam pernyataan tebusan bagi mewajarkan pengetepiannya (lihat perenggan 35–36).]

Notes

For cases on priorities in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4401–4432.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd [2005] 1 MLJ 57; [2004] 4 CLJ 232, CA (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143; [1980] 1 LNS 92, FC (refd)
Malayan United Finance Bhd v Tan Lay Soon [1991] 1 MLJ 504; [1991] 1 CLJ Rep 292; [1991] 2 CLJ 899, SC (folld)
S & M Shopping Arcade Sdn Bhd & Ors v Fui-Lian Kwong Hing Sdn Bhd (No 2) [2006] 4 MLJ 350; [2006] 1 LNS 174, HC (refd)
Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 MLJ 705; [1998] 2 CLJ 845, CA (refd)

Legislation referred to

National Land Code ss 242(1), 266(1), Form 16A

Appeal from: Originating Summons No DA-24NCvC-277–08 of 2015 (High Court, Kota Baharu)

Amarjeet Singh s/o Mehar Singh (Zubeda & Amarjeet) for the appellant.
Amirtheyeswary d/o Mayachandrapirapu (Iza Ng Yeoh & Kit) for the respondent.

Lim Yee Lan JCA:

INTRODUCTION

[1] This appeal arose from a decision of the Kota Bharu High Court dated 16 December 2015 in dismissing an originating summons filed by the appellant in which she seeks, inter alia, for a declaration that the redemption sum stated in a redemption statement dated 20 May 2015 ('the redemption statement') issued by the respondent ('bank') pursuant to an order of the same High Court dated 17 March 2015 was invalid or incorrect and for an order that the bank be directed to reissue a correct redemption statement.

BACKGROUND FACTS

[2] In consideration of a housing loan ('HL') for the sum of RM240,000 and an overdraft facility ('OF') in the sum of RM150,000 granted by the bank, the appellant's husband, Md Nazri bin Abdullah ('Nazri') created two charges in favour of the bank over a property owned by him, based on the terms and conditions in the charge annexures.

[3] The property was a residential house held under Hakmilik GM 2371 Lot 306 Mukim Peringat Daerah Jajahan Kota Bharu Negeri Kelantan issued in the name of Nazri as registered proprietor ('property').

[4] The two charges were in the statutory Forms 16A as specified in

sub-s 242(1) of the National Land Code ('the NLC') and were registered at the relevant land office vide presentation Nos 1043/1999 ('the first charge') and 4808/2002 ('the second charge'). A

[5] Nazri was adjudged a bankrupt on 20 May 2007. B

[6] The bank had obtained an order for sale of the property from the land administrator (it being held under a land office title) on 1 October 2014.

[7] The appellant applied to the Kota Bharu High Court vide an originating summons dated 10 February 2015 ('first OS'), in her capacity as the wife of Nazri, in which she sought the following declarations and orders from the court: C

(a) that she has a beneficial interest in the property; D

(b) that the bank be directed to issue to her a redemption statement in respect of all outstanding amounts under all loans/facilities granted by the bank to her husband to enable her to redeem the property; and

(c) that the order for sale be deferred or stayed for three months pending the redemption exercise. E

[8] Since the respondent did not oppose the first OS the High Court had by an order dated 17 March 2015 ('first order') granted order in terms of the first OS to the appellant. F

[9] Pursuant to the first order, the respondent issued two notices of the same date, 20 May 2015, in Nazri's name: (i) a notice of consolidation of accounts ('notice of consolidation'); and (ii) a notice under the heading 'redemption sum cum undertaking' ('redemption statement'). G

[10] The notice of consolidation consolidated outstanding amounts under the following accounts maintained by Nazri for the purpose of servicing the loan and overdraft facilities granted to him by the bank: H

(a) the HL A/C: 2–00110–16 (20010) = RM112,000;

(b) the OD A/C: 3–1022796–11 = RM141,500; and

(c) partial of CSC A/C: 3–09389–34) = RM215,000. I

[11] The CSC account was in respect of a facility given to an enterprise known as CSC Computer System & Consultancy owned by Nazri as the sole proprietor. This facility was secured by a different security distinct from the property under the two statutory charges.

[12] The redemption sum of RM468,500 stated in the redemption statement represents the outstanding amounts owing by Nazri under the three aforementioned accounts.

[13] The appellant complained to the bank that the redemption statement was incorrect or invalid as it had included the amount in the CSC account which was not a facility secured under the two statutory charges and had insisted that she be allowed to pay the sum of RM253,500, being the outstanding amounts due under the HL and OF accounts secured by the property under the two statutory charges.

[14] The bank responded by saying that the redemption statement was correctly issued under the terms of the first order, in which the appellant had agreed to 'settle all the outstanding sums under all loans/facilities given to her husband by the bank' in order to redeem the property and that she could not have a better right than her husband as the borrower/chargor under the terms of the two statutory charges.

[15] The bank also pointed out that the calculation of the redemption sum was correctly done in accordance with the terms of the letters of offer for the HL and OF as well as under cl 31 of the annexure in the first charge (in pari materia with cl 36 of the annexure to the second charge) which give to the bank the right to consolidate outstanding amounts owing under any or all loan/facilities accounts maintained by Nazri with the bank.

[16] Dissatisfied with the response of the bank, the appellant then filed a second originating summons dated 16 December 2015 ('second OS') in which she seeks, inter alia, the following reliefs:

(a) a declaration that the bank had no right to consolidate the CSC account with the HL and OF accounts and the notice of consolidation was a clog to the right of redemption granted to the appellant in the first order;

(b) a declaration that the redemption statement did not contain a correct or valid redemption sum in accordance with the terms of the first order;

(c) an order for the bank to reissue a redemption statement that correctly reflects the outstanding amounts due under the HL and OF accounts only; and

(d) an order that the order for sale be stayed pending the disposal of the action.

DECISION OF THE HIGH COURT

[17] The learned High Court judge (who had earlier granted the first order) by an order dated 16 December 2015 ('second order') dismissed the second OS with costs based, inter alia, on the following grounds:

(a) it is clear that one of the reliefs sought by the appellant in the first OS was that she be allowed to redeem all the loans (*menebus segala pinjaman*) given by the bank to her husband, Nazri. The appellant did not limit the redemption amount up to the sum of RM250,000 only;

(b) the bank had then used its power of consolidation pursuant to the first and second letters of offer and cll 31, 36, 57 and 71 of the first and second charges to consolidate the three accounts and came up with the figure of RM468,500;

(c) had the appellant indicated that she would like to settle the outstanding sums under the HL and OF accounts only in her first OS, the bank would not have agreed to the application;

(d) it is trite law that an order made by consent, in the absence of fraud, can only be varied by consent (see: *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705; [1998] 2 CLJ 845; *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92; *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75).

(e) consequently, unless by consent the first order is varied, this court is functus officio after recording the consent order pursuant to the appellant's own prayers in the first OS. In fact, the appellant had willingly entered into the consent order even before obtaining the redemption sum from the bank or knowing the amount she had to pay in order to redeem the property; and

(f) the appellant was not under any misapprehension or confusion with respect to the terms of the first order which were recorded based on the terms of her application in her first OS. She was represented throughout by her counsel and was not misled as to the terms of the first order (see: *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* [2005] 1 MLJ 57; [2004] 4 CLJ 232).

OUR DECISION

[18] The appellant appeals to this court against the second order and the appeal came up for hearing before us on 25 August 2016. We had, after considering the oral and written submissions of respective learned counsels and having perused the record of appeal, by a unanimous decision dismissed the

appeal with costs and affirmed the decision of the High Court. We now give the reasons for our decision.

REASONS FOR OUR DECISION

The appellant had no locus to file the first OS

[19] At the commencement of the hearing, we had enquired from learned counsel for the appellant the basis upon which the appellant, as the wife of the chargor, purported to acquire the necessary locus standi to seek the various reliefs in the first OS. Unfortunately, learned counsel was unable to do so, beyond regurgitating the same argument he put forward before the learned High Court judge that since the property was matrimonial property and as the wife who had contributed to the acquisition of the matrimonial property she had a beneficial interest in the property and as the beneficial owner, she had an 'equity or right of redemption' of the property from the bank based on the terms of the first order.

[20] We had informed learned counsel that he was completely misconceived and that under the provisions in the NLC relating to statutory charges, his client had no locus standi, whether in law or in equity, to either exercise the right under s 266(1) of the NLC to tender any payment to the registrar of the High Court or land administrator, as the case may be, before the sale of the property after the order for sale has been issued or to discharge the property from the two statutory charges, as these are rights granted exclusively to Nazri as the chargor only.

[21] In this regard, we had relied on, as the basis of our authority, the illuminating decision of the then Supreme Court in the case of *Malayan United Finance Bhd v Tan Lay Soon* [1991] 1 MLJ 504; [1991] 1 CLJ Rep 292; [1991] 2 CLJ 899 ('Malayan United Finance') (cited to us by learned counsel for the bank) which clearly sets out the position relating to a statutory charge under the NLC.

[22] In *Malayan United Finance*, the facts as narrated in the headnotes to the reported judgment read as follows:

> KMT, the registered proprietor of two parcels of land (the said lands), charged its property on 13 June 1984 to the appellant A, as security for a loan of RM1.5m. As a result of default in loan repayments, A took steps for foreclosure proceedings and in doing so, discovered that the respondent R had, on 12 April 1989, lodged two private caveats on the said lands.
>
> On 10 March 1984, R had entered into an agreement with KMT whereby KMT had agreed to sell to R the said parcels of land; a draft sale and purchase agreement (S & P) and deposit was sent to KMT's solicitors. This agreement was never

executed and on 23 March 1984, KMT's solicitors advised R that the deal was off. R's action for specific performance and damages against KMT is still pending.

A's demand for removal of the caveat was refused; as a result A applied to the High Court under s 327 of the National Land Code ('the NLC') for the removal of the caveats, contending that its interest under the charge were indefeasible and that it ranked in priority over and above those of R. KMT also applied for the removal of the caveats under s 326(1) of the NLC.

R contended that by virtue of the S & P, he had caveatable interest in the said property and that as a purchaser; he was entitled to redeem the said land to protect his interest which right A could not deny him. In addition R submitted that his right to discharge the charge transcended priority of A's charge.

KMT's application was dismissed by the High Court on the ground that R had satisfied the court that in fact and in law, there were serious questions to be tried in relation to the contract of sale and that on the balance of convenience, it would be better to maintain the status quo until the trial of R's action against KMT.

In relation to A, the learned judge proceeded to consider A's application not on the question of priority of the charge but on the basis of principles enunciated by Salleh Abas FJ in *Eng Ah Mooi*'s case on the right of equity of redemption of a charge; the High Court then held that as R had succeeded in showing a triable issue as between R and A, in the balance of convenience, it would be better to maintain the *status quo* until the disposal of the action.

The issue for the court is the indefeasibility and priority of the charge over the caveats and the *R's right to redeem the charge.*

In Eng Ah Mooi's case, Salleh Abas FJ had stated that the English doctrine of equity of redemption was applicable in that case in relation to a charge.

In this decision, the Supreme Court examined this English rule in Eng Ah Mooi's case and the question of mortgages and rule of equity of redemption in England before and after the Law of Property Act 1925 and compared the situation in New South Wales, Australia and in Malaysia.

[23] The Supreme Court, writing through Mohd Jemuri Serjan SCJ (as His Lordship then was) held as follows:

[1] The legal proposition as laid down in *Eng Ah Mooi's case, unless overruled as having been decided per incuriam, would have the effect of introducing a novel doctrine of equity of redemption into the concept of a statutory charge under the NLC and this would be tantamount to legislating by case law — this is not the function of the court.*

[2] (a) under the present system of creating legal mortgages under the Law of Property Act in England, the mortgagee takes only a teRMof years leaving the legal freehold reversion expectant on the mortgage teRMin the mortgagor. Thus the mortgagor retains his legal freehold estate and cannot at the same time have an equitable estate co-extensive with it;

(b) instead of his equity of redemption constituting an equitable estate or interest, it subsists only as a right in equity to redeem the property, this right being attached

to his legal freehold estate; incident to every mortgage is the right of the mortgagor to redeem;

(c) *when Salleh Abas FJ was quoting Pearce v Morris in Eng Ah Mooi's case, His Honour was in fact applying the English concept of mortgage with its incident of 'equity of redemption' into our NLC where a charge is only a security for a loan without the necessity of the transfer of the estate or interest in the charged land; however, the equity of redemption and a discharge of a charge are poles apart.*

[3] (a) The equity of redemption as is known in England which is in the nature of a right bears no similarity in idea and effect with the equity of redemption in New South Wales, Australia where a mortgage is closely analogous to a charge under our NLC; in practice, it is coupled with a transfer of the legal title as well — the equity of redemption is not a right but instead is a concept which has grown out of practice;

(b) *'equity of redemption' is a misnomer but persistence in its use is not a matter of law* but of habit in Australia, and *in Malaysia it does not exist at all*, either in the sense as understood in English law or in Australia, at least in New South Wales;

(c) *since the right of interests in the charged land remains with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it under the NLC is clearly technically and legally incorrect. The teRMso used in relation to a charge is not only a misnomer but nonsensical;*

(d) *the decision in Eng Ah Mooi's case was made without the benefit of the Privy Council decision in the case of Haji Abdul Rahman v Mohamed Hassan* [1917] AC 209 *whereby it was held that the teRM'equity of redemption' was inapplicable to statutory charges under the NLC;*

(e) *Eng Ah Mooi's case was held to be per incuriam on the applicability of equity of redemption to statutory charges under the NLC.*

[4] (a) *There is no statutory provision in the NLC for the discharge of the charge by the chargor but his right, and that of a borrower to do so, is embodied in the provisions of the charge itself. See clause 3(ii) of the Annexure to the charge and s 249(1) of the NLC;*

(b) *however under s 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the Registrar of the Court or the Collector to cover all expenses in connection with the judicial sale; this is a specific and exclusive right granted to the chargor.*

[5] (a) *R's proposition that he has a statutory or equitable right of discharge or redemption of a charge under the provisions of the NLC is rejected*; *however the Court affirmed the right of the chargor or the borrower to discharge a charge under the Annexure to the charge which is to be read together with s 249(1) of the NLC which right ineluctably is not available to R;*

(b) the question of the competing right to discharge the charge on the part of R does not arise at all and therefore the priority of A's charge prevails. (Emphasis added.)

[24] The decision of the Supreme Court in *Malayan United Finance* on the position of a statutory charge under the NLC is crystal clear and any elaboration on our part would be totally unnecessary. Suffice if we emphasised

that the Supreme Court had in its decision overruled the legal proposition laid down in the case of *Eng Ah Mooi* (that the English doctrine of 'equity of redemption' is applicable in relation to a statutory charge under the NLC) on the ground that the term 'equity of redemption' does not exist in this country and the persistence in its use is not a matter of law but of habit.

[25] It is equally clear from the decision in *Malayan United Finance* that the right to tender payment before a sale under s 266(1) of the NLC or to discharge a charge (under the provisions of the charge) are rights granted exclusively to the chargor alone.

[26] Applying the legal propositions laid down in *Malayan United Finance* to the facts of this case, it is clear that the appellant, as the wife of Nazri, has no locus standi, whether in law or equity, to apply for the various reliefs in the first OS and, to borrow the words of the Supreme Court in *Malayan United Finance*, for learned counsel to speak of the appellant's 'equity of redemption' or the like of it in respect of the property under the NLC is not only technically and legally incorrect, but a misnomer and nonsensical.

Redemption statement correctly issued under terms of first order

[27] In any event, even assuming that the appellant had the locus standi to file the first OS, and the first order was in effect a consent order, the question for determination by this court is whether the redemption statement was correctly and properly issued in accordance with the terms of the first order?

[28] Now it is trite law that a consent order, although under the seal of the court, operates as a contract and enforceable as such and its terms are to be construed in accordance with principles governing the construction of a contract (see: *S & M Shopping Arcade Sdn Bhd & Ors v Fui-Lian Kwong Hing Sdn Bhd (No 2)* [2006] 4 MLJ 350; [2006] 1 LNS 174).

[29] It is also trite law that construction of contract is a question of law to be decided by the court. In this respect, the court, in its task to ascertain the intention of the parties, will ordinarily use the objective test. In other words, it will ask itself what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract (per Edgar Joseph Jr FCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 (SC)). Also, the objective intention of the parties is to be determined based on the plain and ordinary meaning of the words used in the contract as well as the factual matrix forming the background to the transaction (excluding of course any part of the background that is declaratory of subjective intent only) (see: *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597).

[30] Reverting to the appeal before us, the main dispute between the parties revolves around the interpretation of para 2 of the first order which reads as follows:

> 2. Defendan Kedua hendaklah memberikan suatu penyata penebusan bagi Hartanah tersebut untuk membolehkan Plaintif melaksanakan hak penebusan bagi Hartanah tersebut terhadap segala pinjaman oleh Defendan Kedua kepada Md Nazri Bin Abdullah.

[31] Applying the principles governing construction of contracts as set out earlier, it is our considered view that the words appearing in para 2 of the first order in their plain and ordinary meaning and objectively construed, simply mean that the bank is required to issue a redemption statement which would reflect outstanding amounts in respect of all the loans and facilities granted by the bank to the appellant's husband, Nazri, in order to enable the appellant to discharge the property as a security under the two charges.

[32] Indeed para 2 of the first order accords with the various provisions in the annexures to the first and second charges relating to consolidation of accounts and amounts payable by the chargor in order to discharge the charges:

Clause 44 of the first Charge (and clause 52 of second Charge)

> *Subject to the rights of the Bank under Clause 31 herein* upon payment to the Bank of the Principal Sum together with all interest thereon and all other whatsoever moneys payable by the Chargor under this Charge the Chargor shall be entitled to obtain a discharge of this Charge provided that the Memorandum of Discharge of Charge shall be prepared by the solicitors appointed by the Bank and duly executed by the Bank and all costs incurred in respect thereof (including the cost of the solicitors acting for the Bank) shall be borne and paid by the Charger

Clause 31 of the first Charge (and clause 36 of the second Charge)

> 31(1) Section 245 of the National Land Code 1965/Strata Titles Act 1985 restricting the right of consolidation shall not apply to this Charge. In addition to and without prejudice to any other right of consolidation *it is hereby declared that the said Property shall not be redeemed save and except on payment of not only all moneys secured hereby but also moneys whatsoever and howsoever owing or payable or due from the Chargor to the Bank under any other account whether as borrower, guarantor, assignor or otherwise with the Bank secured hereby but also moneys secured by any other security over any property other than the property comprised in this Charge* which is at the date hereof or at any time hereafter created in favour of the Bank by the Chargor or any person through whom he claims.
>
> (2) *Without prejudice to any other remedy which the Bank may have the Bank may at any time and without notice to the Chargor combine or consolidate all or any of the accounts of the Chargor with any liabilities of the Chargor under any other agreement or contract* — with the Bank and set off or transfer any sum or sums standing to

the credit of any one or more of such accounts agreement or contracts in or towards the satisfaction of any of the liabilities of the Chargor therein. (Emphasis added.)

[33] We agreed with the contention of learned counsel for the bank that by virtue of cll 31 and 44 of the first charge (and cll 36 and 52 of the second charge) as set out above, the chargor (Nazri)'s right to discharge the first and second charges is subject to the following conditions:

(a) not only must he pay all moneys due under the HL and the OF secured by the property under the first charge and second charge, but all moneys owing and payable under any other loan/facility (in this case the CSC account) granted to him by the bank;

(b) regardless of whether the moneys due and owing by him under any other account(s) with the bank (in this case the CSC account) is secured by any security other than the security comprised in the first charge or the second charge and whether in his capacity as borrower, guarantor, assignor or otherwise; and

(c) the bank may at any time without prior notice to him consolidate any or all of his account(s) with the bank to settle all his liabilities with the bank.

[34] As stated earlier, the redemption sum specified in the redemption statement was a consolidation of the outstanding amounts due and owing from Nazri as the borrower under the HL, OF and CSC facilities granted to him by the bank as at the date of the redemption statement.

[35] We were in entire agreement with learned counsel for the bank that had Nazri himself as the borrower/chargor applied to the bank to discharge the property as security under the two statutory charges, he would have been bound by the aforementioned clauses in the annexures to the two charges. There was therefore no reason why the appellant should have a better right than Nazri in a similar application, neither would the bank have agreed to the terms in the first order had it been otherwise.

[36] In conclusion, we agreed with the learned High Court judge that the redemption statement was properly issued in accordance with the terms of para 2 of the first order and there was no error or mistake in the said redemption statement to warrant its setting side.

ORDER

[37] For the reasons stated above, we had dismissed the appeal with costs and affirmed the decision of the High Court. We fixed costs in the sum of RM5,000 to the respondent subject to the payment of allocator fee. Deposit was refunded to the appellant.

Appeal dismissed and decision of the High Court affirmed.

Reported by Afiq Mohamad Noor